



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 03, 2023

IN THE MATTER OF:

Appeal Board No. 627969 A

PRESENT: MICHAEL T. GREASON, MEMBER

The Appeal Board, on its own motion pursuant to Labor Law § 534, has reopened

and reconsidered Appeal Board No. 622295 filed July 19, 2022, which (1) reversed filed March 21, 2022; and (2) sustained the revised initial determination holding the claimant unable to file a valid original claim, effective September 27, 2021, based on the claimant's base period employment with A. PROGRAM/PROJECT MANAGEMENT CONTRACTING & CONSULTING LLC, because members of a Limited Liability Company (LLC) are not considered employees and their services performed on behalf of the LLC are not covered employment pursuant to Labor Law § 511.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has been the sole member of A. PROGRAM/PROJECT MANAGEMENT CONTRACTING & CONSULTING LLC (hereinafter "The LLC"), filed with the New York State Department of State. The claimant performed services on behalf of The LLC.

Effective January 1, 2016, New York State Department of Taxation and Finance (NYSDTF) approved The LLC's election to be treated as an S corporation for tax purposes. Effective March 28, 2016, Internal Revenue Service (IRS) approved The LLC's election to be treated as an S corporation for tax purposes. Thereafter, The LLC filed federal Income Tax Returns for an S corporation (Form IRS 1120-S). For example, the 2021 Form 1120-S, which shows The LLC's "S-election effective date 03/28/2016", demonstrates that The LLC paid

\$15,385.00 in W-2 wages to the claimant (line 7 Compensation to officers).

The LLC paid unemployment tax contributions and reported the Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return (NYS-45). For example, the wage reporting information from NYSDTF credited the claimant with W-2 wages from The LLC in the amounts of \$9,000.00 in 4th quarter 2019; \$9,745.53 in 1st quarter 2020; \$15,385.00 in 2nd quarter 2020; \$7,692.31 in 1st quarter 2021; and \$7,692.31 in 2nd quarter 2021.

On October 4, 2021, the claimant applied for unemployment benefits, made effective September 27, 2021, thereby establishing a base period from 2nd quarter 2020 through 1st quarter 2021, and an alternate base period from 3rd quarter 2020 through 2nd quarter 2021.

OPINION: We have reopened this case in light of Appeal Board No. 625751A (filed February 2, 2023), which held that an LLC member received covered wages under Labor Law § 511 from the LLC where it properly filed an election to be

treated as a corporation.¹

The evidence establishes that the claimant's W-2 earnings from The LLC should be treated as wages from covered employment for unemployment insurance purposes. Initially, the IRS publication, LLC Filing as a Corporation or Partnership

(<https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership>), in relevant part, provides the following:

A Limited Liability Company (LLC) ... with at least two members is classified as a partnership for federal income tax purposes unless it ... elects to be treated as a corporation. ... Thus, an LLC that has been treated as a partnership for several years may be able to prospectively change its classification to be treated as a corporation by filing Form 8832.

...

If the LLC [elects to be treated as] a corporation, normal corporate tax rules will apply to the LLC and it should file a Form 1120, U.S. Corporation Income Tax Return. The 1120 is the C corporation income tax return, and there are no flow-through items to a 1040 or 1040-SR from a C corporation return. However, if a qualifying LLC elected to be an S Corporation, it should file a Form

1120-S ... and S corporation laws apply to the LLC. Each owner reports their pro-rata share of corporate income, credits and deductions on Schedule K-1 (Form 1120-S). (Emphasis added.)

Also, the IRS Frequently Asked Questions,

<https://www.irs.gov/faqs/small-business-self-employed-other-business/entities/entities-3>, in relevant part, provides the following:

An LLC may elect a classification as a C corporation or an S corporation (assuming the LLC otherwise satisfies the requirements). Use Form 8832, Entity Classification Election to make an election to be a C corporation. Use a Form 2553, Election by Small Business Corporation to make the election to be an S corporation. ... An eligible entity that timely files Form 2553 to elect classification as an S corporation is deemed to have made an election under Regulations Section 301.7701-3(c)(v) to be classified as an association taxable as a corporation. (Emphasis added.)

Here, The LLC made the election and was approved by the IRS and NYSDTF to be classified and treated as an S corporation for tax purposes effective 2016.

The LLC filed IRS 1120-S, paid W-2 wages to the claimant, issued W-2 statements, and reported the W-2 earnings to New York State by filing the Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return (NYS-45). Under these circumstances, we find and conclude that The LLC complied with all the legal requirements to be treated as an S corporation for federal and state tax purposes, including the New York State Department of Labor. See Appeal Board No. 628456A.

While W-2 statements, in and of themselves, do not confer entitlement to unemployment benefits to individuals specifically excluded (e.g., exclusionary sections in Labor Law § 511), nothing in Labor Law § 511 excludes W-2 earnings

from a member of an LLC that makes the election.² We note that New York and Massachusetts define "wages"³ similarly, and that the Massachusetts Board of Review⁴ similarly holds that a member of an LLC (even where the LLC failed to produce IRS Forms 2553 or 8832 but has established that the LLC elected to be treated as a corporation through its Income Tax Returns [Form 1120-S]), has earned covered base period wages from the LLC, which establishes a valid original claim.⁵ Moreover, Massachusetts also finds no covered employment for an LLC member when the LLC fails to establish that it made such an election.⁶

Significantly, Unemployment Insurance Program Letter No. 26-08 (September 8, 2008) acknowledges an LLC's ability to make an election to be treated as a corporation. UIPL 26-08, in relevant part, provides as follow:

The changes [herein] will affect single-member limited liability companies (SMLLC) or qualified subchapter S subsidiaries (QSub), who are "disregarded" by the IRS as entities separate from their owners for Federal tax purposes (disregarded entities).

. . .

Limited Liability Companies (LLCs) were created by state statute. When the states created LLCs, the IRS did not create a new tax classification, but instead applied the three tax entity classifications it had always used for business taxpayers: corporation, partnership, or sole proprietor. SMLLCs may presently elect treatment as a corporation for Federal employment tax purposes by filing Form 8832, Entity Classification Election. Absent an election, the IRS currently regards an SMLLC as a sole proprietor for employment tax purposes. (Emphasis added.)

First, all business entities are created by state statute, whether they are sole proprietorships, partnerships, limited liability companies, or corporations. Second, there is no dispute of the Commissioner's position that the LLC's structure was unchanged by its election to be treated as a corporation, i.e., that the LLC is somehow converted into a corporation. Third, the IRS merely chose to apply to the LLC the existing "three tax entity classifications it had always used for business taxpayers: corporation, partnership, or sole proprietor", and to permit an LLC to be taxed, by default as a disregarded entity (partnership or sole proprietor), or to elect to be treated as a corporation. Fourth, even though an LLC is unincorporated and LLC members remain statutorily entitled to voting rights, management authority, and a share of profits and losses, which are all indicators of self-employment, the same is true for a corporate shareholder/officer who may receive corporate dividends (profits) and yet receive W-2 earnings for work performed on behalf of the corporation.

Citing Matter of Heymann, 192 AD2d 861 (3d Dept 1993), and Matter of Giampa (Quad Capital, LLC), 181 AD3d 1129 (3d Dept 2020), the Commissioner had contended that managing members of an LLC are not entitled to unemployment

benefits. However, Heymann involved a partnership (not an LLC) with no evidence of an election to be treated as a corporation, and Giampa involved a securities trader with no evidence that the claimant was a bona fide LLC member. We find that an LLC's election to be treated as a corporation for tax purposes is not inconsistent with Heymann and Giampa.

We are further unpersuaded by the Commissioner's contention that *Matter of Enjoy the Show Management Inc., DBA Teasers*, 287 AD2d 822 (3d Dept 2001) is applicable. That case holds that "rulings of the Internal Revenue Service regarding whether an employer-employee relationship exists for tax purposes are not binding upon the Board", and not on the issue of whether an LLC's W-2 payments, which were properly paid after election and approval to be treated as a corporation by both the IRS and NYSDTF, should be treated as covered earnings.

Furthermore, the Department has access to, and thereby is on sufficient notice, when an entity reports W-2 earnings of an LLC member on the Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return (NYS-45). While we recognize the concern that self-employed individuals could lay themselves off during periods of inactivity, or delay seeking or obtaining work while opting to receive unemployment benefits, the Department has recourse and could issue a determination that the employment was contrived (see *Matter of Turco*, 156 AD2d 797 (3d Dept 1989), or that the employment was not bona fide (see *Matter of Lucci*, 290 AD2d 786 (3d Dept 2002), or that the claimant was not totally unemployed (see *Matter of Warner*, 278 AD2d 653 (2000)).⁷

As the record establishes that The LLC elected and received approval to be treated as a corporation for tax purposes, that The LLC filed corporate income tax returns and NYS Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Returns, and that the claimant received W-2 wages for services performed for The LLC, we conclude that such earnings are from covered employment for unemployment insurance purposes. Finally, for all the reasons above, we no longer follow Appeal Board Nos. 559037 and 594781 to the extent that these decisions are inconsistent.

DECISION: Appeal Board No. 622295 is rescinded.

is affirmed.

The revised initial determination, holding the claimant unable to file a valid original claim, effective September 27, 2021, based on the claimant's base period employment with A. PROGRAM/PROJECT MANAGEMENT CONTRACTING & CONSULTING LLC, because members of a Limited Liability Company (LLC) are not considered employees and their services performed on behalf of the LLC are not covered employment pursuant to Labor Law § 511, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER

1 On April 27, 2023 (resettled May 1, 2023), the Board issued Appeal Board No. 628456A, which rescinded its decision in Appeal Board No. 625751A but continued to hold that an LLC member received covered wages under Labor Law §

511 and addressed additional contentions raised by the Commissioner of Labor.

2 Minnesota excludes from coverage any owner with 25% or more ownership in the business (Minnesota Law § 268.035, Subd. 20 [29]). New Jersey excludes from

coverage any owner with 5% or more ownership in the business (N.J. Stat. Ann. § 43_21-19[m][1]).

3 Like New York, Massachusetts defines "wages" as "every form of remuneration of an employee subject to this chapter for employment by an employer, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all remuneration paid in any medium other than cash; provided, however [typical exclusions similar to NY]." Massachusetts G.L. 151A § 1(s)(A).

4 Like New York Unemployment Insurance Appeal Board, Massachusetts Board of Review (BOR) decides unemployment appeals of Department of Unemployment Assistance (DUA) hearing decisions. This is the last step in the administrative appeal process before a case may be appealed to district court. (<https://www.mass.gov/orgs/board-of-review>)

5 Board of Review Decision 0035 1763 93 (January 28, 2021); Board of Review Decision 0035 1210 01 (December 4, 2020); and Board of Review Decision 0019 1799 18 (June 29, 2017).

6 Board of Review Decision 0048 4614 68 (August 30, 2021); Board of Review Decision 0035 6051 67 (September 11, 2020); and Board of Review Decision 0012-1800-09 (March 4, 2016).

7 The Court has held that a business owner is eligible to receive benefits when the business is no longer viable and merely waiting dissolution (See e.g., *Matter of Salomone*, 34 AD3d 1037 (3d Dept 2006); *Matter of Haseltine*, 30 AD3d 938 (3d Dept 2006)).

-